DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 934TH TACTICAL AIRLIFT GROUP (AFRES)
MINNEAPOLIS-ST PAUL IAP, MINNEAPOLIS, MN 55450

[illegible]

13 February

Subject: Notification of Ineligibility for Reenlistment

To: SMGT John P. Mcnamar
[illegible] Bimini Ave
St. Paul, MN 55104

Your qualification for reenlistment [illegible] is hereby withdrawn. [illegible] that you are not eligible for reenlistment or extension of enlistment under [illegible] AFR 39-17 which states that an individual [illegible] who [illegible]

[illegible]
LLOYD H. [illegible], Lt, USAFR
Chief, [illegible]

Best Copy Available

[Available copies of Lt. Miller's letter are faded and will not reproduce. The following is a true and correct artifact of his letter.]:

REPLY TO
ATTN OF DFMQ 13 February 1978

SUBJECT Notification of Ineligibility for Commissioning Program

TO TSGT John F. Nieszner
854 Edmund Ave
St. Paul, MN 55104

Your qualifications for commissioning are excellent and your interest in the program is appreciated, however, I regret to inform you that you exceed the age requirements for commissioning as outlined by para 2-11(d)(3), Chap 2, AFR 36-15 which states that an applicant must not exceed age 35.

/s/

LLOYD H. MILLER, 1Lt, USAFR
Chief, CBPO

DEPARTMENT OF THE AIR FORCE HEADQUARTERS
442D TACTICAL AIRLIFT WING (AFRES)
RICHARDS-GEBAUR AIR FORCE BASE
MISSOURI 64080

IG 23 June 1978

Review of Age Discrimination Complaint

TSgt John F. Nieszner
854 Edmund Avenue
St. Paul, Minnesota 55104

1. 934 TAG/IG letter dated 4 June 1978, Subject: Age Discrimination, accompanied by AF Form 1482, dated 28 April 1978, and four attachments, was received in this office on 21 June 1978.

2. I have reviewed the complaint in accordance with paragraph 4a(4) of AFR 123-11, and my findings are as follows:

a. The complaint is specifically against the age requirements for the commissioning program contained in AFR 36-15.

b. The Inspector General Complaint System, AFR 123-11, does not provide for processing of complaints against Air Force regulations. (Reference para 4a(2), 4th and 5th sentences which state: "If the complaint is about an Air Force regulation or statute, the inspector may answer by explaining the regulation or statute to the complaintant. If the individual wants to make a change to a regulation, the inspector should encourage that person to make a suggestion under the USAF Suggestion Award Program.")

c. The 934 TAG/IG processed your complaint properly under the provisions of AFR 123-11.

d. The "Facts Determined" block of AF Form 1482 indicates you have submitted the item under the USAF Suggestion Award Program, which is the method recommended by AFR 123-11. Eligibility of suggestions is contained in para 3-1, Chap 3, AFR 900-4. Note that the suggestion would not be eligible if submitted as a complaint (Reference para 3-3d, Chap 3, AFR 900-4).

JERRY D. OBERHELMAN, Colonel, USAFR
Inspector General

Cy to: 934 TAG/IG

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

JOHN F. NIESZNER,

Plaintiff,

v. MEMORANDUM ORDER

HANS MARK, Secretary of the Air Force,

Defendant.

JOHN S. CONNOLLY, Esq., St. Paul, Minnesota, appeared for plaintiff.

John M. Lee, United States Attorney, by DEBORAH S. KLEINMAN, Assistant U.S. Attorney, Minneapolis, Minnesota, appeared for defendant.

This matter comes before the court upon the motion of defendant for dismissal of plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Fed. R. Civ. P. on the grounds that the court lacks subject matter jurisdiction, and that the complaint fails to state a claim on which relief may be granted. Defendant moves in

the alternative for summary judgment, pursuant to Rule 56 of the Fed. R. Civ. P., on the ground that the defendant is entitled to judgment as a matter of law. Specifically, defendant seeks dismissal as to the plaintiff's claims of discrimination on the basis of age under Air Force Regulation 36-15, paragraph 2-14(c)(3).

Plaintiff John F. Nieszner is a Technical Sergeant in the United States Air Force.

Defendant Hans Mark is Secretary of the Air Force.

The Motion for dismissal asserts that the plaintiff's attack on AFR 36-15 presents a non-justiciable, non-reviewable controversy. The Constitution delegates the authority for running the military to the Congress and the Executive. See Article I §8, cls. 12-14; Article II, §2, Constitution. Case law holds that the courts must be careful not to interfere

with the internal affairs of the military. Gilligan v. Morgan, 413 U.S. 1 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953). Statutory law delegates some of the Congressional power to the armed service Secretaries. 10 U.S.C. §591(b) reserves the prescription of physical, mental, moral, professional and age qualifications for appointment of persons as reserves of armed forces to the jurisdiction of the Secretary.

The plaintiff offers the conclusion that this matter is justiciable because it involves a Constitutional challenge to the Air Force regulation on Fifth Amendment grounds.

The issue of the appropriateness of judicial review of internal military affairs was addressed by Judge Edward J. Devitt in Doe v. Alexander, 510 F.Supp. 900 (D. Minn. 1981). Judge Devitt analyzed the due process and equal protec-

tion aspects of the case in light of a four-factor test presented in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

The four factors are:

1. The nature and strength of the plaintiff's challenge.

In this case, the plaintiff challenges the regulation on Fifth Amendment grounds, but there is no constitutional right to be commissioned in the Air Force Reserve or to serve in the armed forces at all. Doe v. Alexander, 510 F.Supp. at 904; Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Orloff v. Willoughby, 345 U.S. 83, 90 (1953).

2. The potential injury to plaintiff if review is declined.

The plaintiff contends that if he were commissioned, it is likely he would have been appointed as captain. Since such an appointment is a matter of Presidential discretion, 10 U.S.C. §593, plaintiff's injury is speculative.

3. The degree of interference with military function.

4. The extent of military expertise or discretion involved.

The need for a young, vigorous officer force is a Congressional determination. 10 U.S.C. §591 provides that the Secretary shall prescribe qualifications for appointment. These include age restrictions. Courts should defer to the superior knowledge of experienced military professionals in matters such as promotions. Mindes v. Seaman, 453 F.2d 197, 202 (1971).

The Eighth Circuit upheld application of the Mindes text in Henson v. Alexander, 478 F.Supp. 1044 (1979).

In view of this test, and in view of the fact that professional military judgments are subject to civilian control of the Legislative and Executive Branches,

Gilligan v. Morgan, 413 U.S. 1 (1973), we find plaintiff's claim is not reviewable.

Upon the foregoing,

IT IS ORDERED That defendant's motion for dismissal is granted on grounds that it fails to state a claim upon which relief may be granted.

DATED: October 14, 1981.

Donald D. Alsop
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2343

John F. Nieszner,

Appellant,

v.

Hans Mark, Secretary of the Air Force,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: May; 20, 1982

Filed: July 21, 1982

Before BRIGHT, Circuit Judge; FLOYD R. GIBSON, Senior Circuit Judge; and ARNOLD, Circuit Judge.

BRIGHT, Circuit Judge.

John F. Nieszner appeals from the district court's[1] dismissal of his age discrimination claim against the Air Force. Nieszner seeks to challenge Air

Force Regulation 36-15, ¶2-14(c)(3) (1978) (AFR 36-15), which requires an applicant for a commission program to "[b]e appointed as a commissioned officer before reaching age 35." The district court dismissed Nieszner's complaint for failure to state a claim on which relief may be granted. We affirm.

I. Background.

Nieszner, a technical sergeant in the Air Force Reserve, applied for an opening in the Outstanding Airmen Commissioning Program in February of 1978. Although Nieszner fulfilled the various educational and testing requirements specified in the regulations, he alleges that the Air Force unfairly turned him down solely because at age thirty-six, he was too old to qualify under AFR 36-15.

---

[1]The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

After Nieszner's pursuit of relief through intraservice grievance procedures proved unsuccessful, he filed a complaint in the district court seeking a declaratory judgment, preliminary and permanent injunctions, and money damages for alleged infringements of his constitutional rights. Specifically, Nieszner claimed that AFR 36-15 imposes an arbitrary and irrational age limitation, and that its application to him constitutes age discrimination in violation of his rights under the fifth and fourteenth amendments. The district court deemed the challenged regulation inappropriate for judicial review, and dismissed the complaint.

On appeal Nieszner argues that he presented a justiciable, constitutional claim against the military which the district court should have considered on the merits.

II. Discussion.

In dismissing Nieszner's claim, the district court relied on Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), in which the Fifth Circuit noted the traditional judicial reluctance to interfere with internal military affairs.

> What we really determine is a judicial policy akin to comity. It is a determination made up of several subjective and inter-related factors. Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute court orders for discretionary military decisions. Concern has also been voiced that the courts would be inundated with servicemen's complaints should the doors of reviewability be opened. But the greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission. [Mindes v. Seaman, supra, 453 F.2d at 199.]

Recognizing, however, that "the courts have not entirely refrained from granting

review and sometimes subsequent relief[,]" id., the Mindes court considered a range of cases reflecting the competing policies for and against judicial review of claims against the military. Id. at 199-201. From these, the court distilled a two-part test for determining whether to review such claims.

First, a plaintiff challenging an internal military decision must allege a violation of the Constitution, a statute, or military regulation, and demonstrate exhaustion of intra-service remedies. If a plaintiff satisfies the first step, the trial court must then balance four factors to determine the claim's suitability for judicial review: (1) the nature and strength of the plaintiff's challenge to the military determination, (2) the potential injury to the plaintiff if review is refused, (3) the type and degree of anticipated interference with the

military function, and (4) the extent to which the exercise of military expertise or discretion is involved. Id. at 201-02.

In balancing the four Mindes factors,[2] the district court stated first that Nieszner had not presented a constitutional claim, because there exists no constitutional right to serve in the Armed Forces.[3] Secondly, the court concluded that the potential injury to the plaintiff remained speculative if the court denied review, because his appointment, if

---

[2]Applying the Mindes analysis in this case, the district court bypassed the first level of inquiry, and began directly balancing the four factors of step two. We note, however, that Nieszner had satisfied the first step of the Mindes test because he alleged that the application of AFR 36-15 to him denied him due process and equal protection, and he exhausted his intraservice remedies.

[3]Nieszner asserted no statutory claim of age discrimination, nor did he contend that the application of AFR 36-15 to him violated any military regulation. Consequently, we frame our discussion of Mindes in terms of constitutional claims only.

commissioned, falls within the President's discretion. On the final two Mindes factors the court deferred to "the superior knowledge of experienced military professionals in matters such as promotions[,]" and dismissed Nieszner's claim as nonreviewable.

On appeal Nieszner urges this court to reject the Mindes analysis and adopt instead the Third Circuit's approach outlined in Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981). The Third Circuit rejected the Mindes analysis on the ground that "it intertwines the concept of justiciability with the standards to be applied to the merits of the case." Id. at 323.

We do not agree with the Third Circuit's conclusion that the Mindes analysis requires the court to consider the merits of a case in making a threshold determination of reviewability. Although

the second step of the Mindes analysis directs courts to consider "[t]he nature and strength of the plaintiff's challenge to the military determination," Mindes v. Seaman, supra, 453 F.2d at 201, this does not require an evaluation of the merits of the claim presented. Rather, the court must consider whether the plaintiff has presented a claim substantial enough to warrant judicial intrusion into military matters.

> Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values--compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review. [Id. (citations omitted).]

The Fifth Circuit's application of these factors in a subsequent opinion clarified the limited scope of this inquiry. In evaluating the nature and

strength of a claim that an Army regulation barring enlistment of unwed parents of minor children unconstitutionally burdens the right to marry and have children, the court noted that there is no constitutional right to join the military, West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978), and that the Supreme Court has upheld rational restrictions on non-contractual government benefits and services that do not enjoy constitutionally protected status. Id. Because the regulation seemed reasonable in light of military needs, the court concluded that the plaintiff did not have a strong claim. Id. The court stated, however, that its determination did not amount to a prejudgment on the merits: "While we do not here hold that the plaintiffs' constitutional claim lacks merit, we hold that the claim is not powerful; rather it is tenuous." Id.

Similarly, in this case, the district court observed that "there is no constitutional right to be commissioned in the Air Force Reserve or to serve in the Armed Forces at all. Doe v. Alexander, 510 F.Supp. at 904; Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Orloff v. Willoughby, 345 U.S. 83, 90 (1953)." Nieszner v. Mark, 3-80 Civ. 532, slip op. at 2 (D. Minn. Oct. 14, 1961) (emphasis added). The court thereby indicated that the regulation at issue did not affect a constitutional right, making Nieszner's claims tenuous at best. The court did not consider the likelihood of Nieszner's success in proving tht AFR 36-15 violated his constitutional rights. Rather, the court determined only that the regulation did not implicate a constitutional right as Nieszner contended.

Remaining mindful that the Constitution applies to the military, see Crawford

v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976), we nevertheless share the traditional reluctance to interfere in military affairs.

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. [Orloff v. Willoughby, 345 U.S. 83, 93 (1953).]

We believe that the Mindes analysis for determining justiciability of claims against the military fairly accommodates these competing interests. Applying the Mindes test, the district court properly determined that Nieszner presented a non-

reviewable claim. Accordingly, we affirm the district court's dismissal of the complaint.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[AFR 36-15, paragraph 2-14]

2-14. Appointment of USAFR Airmen Not on EAD.
Direct appointment of qualified and deserving airmen not on EAD to officer status and a concurrent Ready Reserve assignment may be made under these criteria:

a. Quotas. HQ USAF/DPXXOA announces fiscal year quotas and any changes.

b. Restrictions on Appointments. Appointments are subject to these limitations:

(1) They may not be made in specialities specified in chapters 4, 5, 6, 7, and 8.

(2) They are restricted to the grade of second lieutenant.

c. Eligibility Criteria. In addition to meeting the prescribed moral, citizenship, medical, age, educational, and testing requirements (paragraphs 2-1 and 3-3), an applicant must:

(1) Have completed:

(a) One good year of the military service obligation (see AFR 35-41, volume II, chapter 1, paragraph 1-3).

(b) Air Forces Officer Preparatory Course through the Extension Course Institute (ECI).

(2) Agree in writing that, if appointed as an officer, to meet the

training requirements of the training category in which assigned, and remain assigned for 3 years in training category A, B, or D. (Failure to participate for reasons within member's control may result in discharge action under AFR 35-41, volume III, chapter 2.)

(3) Be appointed as a commissioned officer before reaching age 35.

(4) Have a baccalaureate degree. (An applicant enrolled in the senior year of college is eligible, but must furnish an official transcript or certification from the registrar that graduation is expected on or before the end of the fiscal year of selection. If otherwise qualified, such an applicant may be conditionally tendered an appointment. After conditional tender of appointment and following graduation, the individual must furnish evidence that the qualifying degree has been conferred and all other applicable requirements are met.) A non-commissioned officer (NCO) also must be a graduate of a recognized NCO academy.

(5) Be tentatively selected for assignment to a vacant lieutenant or captain position in a training category A unit or an authorized mobilization augmentee (MA) position in a Regular Air Force unit.

d. Administrative Actions:

(1) On discharge of an airman to accept appointment under this program, the servicing CBPO sends the Field Record Group (FRGp) to HQ ARPC/DPFDA, 7300 E. First Avenue, Denver CO 80280.

(2) HQ AFRES must inform a selectee who is an Air Reserve technican (ART) that, if appointment is accepted, the ART position must be vacated.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.